



## Texas Department of Health

William R. Archer III, M.D.  
Commissioner of Health

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October 7, 1998

Opinion Committee

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The Honorable Dan Morales  
Attorney General of Texas  
Price Daniel, Sr. Building  
209 West 14th Street  
Austin, Texas 78701

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FIRST ASSISTANT ATTORNEY GENERAL  
ATTORNEY GENERAL'S OFFICE

RQ-1221

FILE # ML-40491-9

I.D. # 40491

Attention: Mr. Jorge Vega, First Assistant Attorney General

Re: Toy Manufacturers of America and registration requirements of Chapter 501 of the Texas Health and Safety Code

Dear General Morales:

We are requesting a legal opinion regarding section 501.024 of the Texas Health and Safety Code and whether it is preempted by federal law, 15 U.S.C.A. sec. 1261 et seq. We believe that the state registration and fee requirements to be enforced by the Texas Department of Health (TDH) are not preempted.

Toy Manufacturers of America ("TMA") is an organization of manufacturers of small balls, balloons, marbles and other certain toys and games which contain small parts. The U.S. Consumer Product Safety Commission has defined these objects as hazardous substances. Under Section 501.024 of the Texas Health and Safety Code, TMA members are required to register with TDH and to pay a registration fee. It is our contention that this requirement does not make the Texas statute substantively different from the federal statute cited above. This contention is based on relevant case law which sets out several factors for courts to review in order to determine whether a federal regulatory scheme preempts a particular state statute. See, Juvenile Products Manufacturers Association Inc., v. Edmisten, 568 F.Supp. 714, (E.D.N.C. 1983). However, TMA contends that the Texas statute is substantively different from the federal statute and therefore under, 15 U.S.C.A. sec. 1278, Note 101(e)(1), the Texas statute is preempted. This reasoning would require that TDH not enforce section 501.024 of the Texas Health and Safety Code.


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TMA also contends that Section 501.024 possibly violates the Commerce clause as it requires a flat fee and allows Texas to encourage exportation of hazardous substances while simultaneously penalizing other states that attempt to do the same.

Please consider this my official request that you issue an opinion on this matter.

If you have any questions, please have a member of your staff contact Susan Tennyson, Supervising Attorney, Office of General Counsel at (512) 458-7236.

Sincerely,



William R. Archer III, M.D.  
Commissioner of Health